

No. 86, Original

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**In the Supreme Court of the
United States**

OCTOBER TERM, 1982

STATE OF LOUISIANA,

Plaintiff

VS.

STATE OF MISSISSIPPI, ET AL.,

Defendants

**REPLY BRIEF FOR LOUISIANA
TO EXCEPTIONS OF MISSISSIPPI**

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I.

PRELIMINARY STATEMENT

The matter before this Court has its genesis in a lawsuit filed by a Mississippi citizen, Avery Dille, Jr., a riparian landowner and a defender herein, against the State of Louisiana and others on or about June 23, 1979 in the Chancery Court of Adams County, Mississippi. The cause of Mr. Dille's suit was the ownership of revenue produced from a Louisiana well (State Well No. 3) which had been directionally drilled from a surface location in Adams County, Mississippi, to a point within the bed and bottom of the Mississippi River in the State of Louisiana.

Mr. Dille's argument, quite simply, was that the boundary between the States of Mississippi and Louisi-

ana, in the disputed area, had migrated westwardly to such an extent that State Well No. 3 (hereinafter referred to as "the well") was, since 1972, the year of first production, in the State of Mississippi.

This suit was removed by the State of Louisiana to the United States District Court for the Southern District of Mississippi, Western Division, on or about July 20, 1979.

An original action was filed by the State of Louisiana against the State of Mississippi and Avery Dille, Jr. on or about December 21, 1979, since ownership of the well or the proceeds thereof, necessarily brought both states into contention as to where their jurisdiction lay.

On October 19, 1981, this Court appointed the Honorable Charles J. Meyers as Special Master to hear this case which was tried on September 20-22, 1982.

The Special Master ruled in favor of the plaintiff, Louisiana, in all respects, on June 15, 1983. Mississippi has filed Exceptions to the Special Master's Report to which Louisiana now replies.

II.

**THE FIRST EXCEPTION OF THE STATE OF
MISSISSIPPI TO THE REPORT OF THE
SPECIAL MASTER**

Mississippi first excepts to the Report of the Special Master in finding as fact that at all times relevant to these proceedings the live thalweg of the Mississippi River in the area of dispute lay to the east of the bottom hole location of the well.

The "area in dispute" is commonly called Giles Bend Cut-off, just to the north of Natchez, Mississippi. As Mr. Hatley Harrison, one of Louisiana's expert witnesses, testified, Giles Bend Cut-off was constructed between the years 1933 and approximately 1939, at which time the cut-off captured the main flow of the Mississippi River, effectively abandoning the old westerly bend which had marked its main course. TR-34-36.

Numerous hydrographic surveys for the years 1972-1982 were introduced by both sides. For the year 1972, Louisiana introduced P-8, a hydrographic survey. Mr. Harrison explained to the Court the meaning of the various symbols located on the chart. Among the many symbols on these charts are stars which, as Mr. Harrison testified, are navigation lights installed by the United States Coast Guard for the safe navigation of the river. TR-48. In addition, Mr. Harrison explained that mile markers are placed on these hydrographic charts at various intervals which represent the distance above the Head of the Passes near the mouth of the Mississippi River. TR-33. The area with which this Court is concerned or, in other words, the location of the bottom hole

of the well, is about 369 miles above the Head of the Passes at the mouth of the Mississippi River.

There are several navigation lights which are of principal interest to the Court. On the right decending bank there is the Gibson light. About 3½ miles downstream on the left decending bank, there is the Giles Bend light and about 2 miles further downstream on the right decending bank there is the Cowpen light. At TR-71, Mr. Harrison explained to the Court exactly how these navigation lights are utilized by mariners, to wit:

MR. KIMMEL:

Q. Now, Mr. Harrison, before you go back and sit down, am I given to believe that as ships come down the river they will see what you've denominated as the Gibson Light, they would see that on their right?

MR. HARRISON:

A. As they decend the river it will be on their right.

MR. KIMMEL:

Q. All right, and in effect what they're supposed to do then is shoot for the Giles Bend light?

MR. HARRISON:

A. That's right, this is the next light that they go for, because it takes them safely across the relatively shallow water of the crossing and it puts them into the deep water on the left decending bank.

MR. KIMMEL:

Q. And then after they reach the Giles Bend Cut-Off they shoot for the next light, which would be Cowpen?

MR. HARRISON:

A. Yes, Cowpen Point here. The navigation instruc-

tion then tell them how to proceed, it says two hundred yards open, or three hundred yards open on the Giles Bend Cut-Off Light, which means they'll be two or three hundred yards off the light in the river, and then they head on down, in some instances it says down midchannel, till they hit the Natchez Beam Light and the George Prince Light, which are not shown here.

There is really no dispute as to the general legal principles involved in this case. When a navigable river forms a boundary between two states, the law of thalweg or middle of the main navigable channel is a true boundary line. *Iowa v. Illinois*, 147 U.S. 1 (1893). The dividing line between two states is not the center of the stream but is the center of the main navigable channel. *New Jersey v. Delaware*, 291 U.S. 361 (1934). This dividing line, or thalweg is the middle of the main navigable channel which is normally the principal course taken by boats and is not necessarily the deepest channel. *Louisiana v. Mississippi*, 202 U.S. 1 (1905).

A state's jurisdiction extends to the thread of the stream, that is, to the "mid-channel," and if there be several channels, to the middle of the principal one, or, rather, the one usually followed. *Iowa v. Illinois*, supra.

When more than one navigable channel exists, the division of the safest channel generally takes precedence. When more than one channel exists and traffic is heavy, then *shipping lanes* may be established without regard to the deepest channel in order to insure the safe and orderly movement of vessels. Similarly, where no particular channel exists, but practically the whole broad expanse of the river is navigable and navigated, the

boundary will be determined by reference to actual or probable use in ordinary course. *Minnesota v. Wisconsin*, 252 U.S. 273 (1919).

Three experts testified at the trial. Mr. Hatley Harrison and Mr. Leo Odom testified on behalf of Louisiana and Mr. Austin Smith testified on behalf of Mississippi.

In determining the thalweg, Mr. Harrison utilized numerous and various documents and data to form his opinion. He used hydrographic surveys for each and every year in question. He utilized the Flood Control and Navigation Maps Number 38 produced by the Mississippi River Commission. He studied the U.S. Coast Guard channel reports for the area in dispute, which channel reports were offered in evidence for each and every year. It is true that Mr. Harrison's line generally follows a line adapted by the Mississippi River Commission and is reflected on the Flood Control Navigation Maps Number 38. But as he testified, his examination of the problem extended far beyond those particular documents.

MR. KIMMEL:

Q. Mr. Harrison, based upon your studies of the hydrographic charts and flood control and navigation maps, the channel reports and all the other documents that you have been able to look at and ascertain for the years from '72 to '82, would you please summarize your feelings to the Court as a result of your investigation.

MR. HARRISON:

A. I have accepted the line shown by the Mississippi River Commission, the flood control and navigation maps, for a number of reasons. I've explained all the hydrographic surveys by the Corps of Engineers

from March 1972 through March, 1982, I've noted the crossing areas, all of the surroundings, I've located in color the deep water, I've noted the location of the lights. I've noted particularly the Giles Bend Cut-Off Light; it's been there since 1938 in the immediate vicinity. I have noted the aids to navigation on all of these maps, the location of the buoys. I have noted the relationship of the Gibson Light to the Giles Bend Light. I have noted the U.S. Coast Guard channel reports that are issued for the safer navigation of the river. The intention of these charts is to furnish you a guide for safe navigation, high water, low water, night, day, 24 hours a day, 365 days in the year, and they are particularly oriented toward low water navigation because you've got to navigate safely at a critical time. It so happens in this particular area we do have deep water all year round. I have noted the 12 by 300 foot project channel, which the Corps hopes to maintain in the future, as soon as they stabilize the channel. As of now they can only maintain a 9-foot deep below water by 300 foot channel, but there's no need to do any dredging here because you already have your water so that's not applicable here. I've also noted that you have some very large tows on the Mississippi River, some of these as long as a quarter of a mile, some of them seven and eight barges wide. I think a barge is 135, 90 feet; you have quite a tow. Those barges, those navigators don't tie up every night.

THE SPECIAL MASTER:

Q. What's the draft of a particular barge?

MR. HARRISON:

A. Well, they try to maintain a 9-foot channel today.

THE SPECIAL MASTER:

Q. What is it, nine feet below the barges?

MR. HARRISON:

A. They like to maintain a 12-foot channel. At high stages of the river you can get some that draw more than nine feet. But the draft of the barges varies with whatever they are hauling, coal; or petroleum, rather. I've noted that I cannot ignore the lights, the navigation lights, you cannot ignore them. I have examined the geological thalweg connecting the deepest points at each one of those cross-sections which you saw on all of the preceding exhibits, I noted how it zig-zagged across the river. It couldn't be followed. But in all instances the geological thalweg is found in the deepest part of the river and it's always found, it always separates the bottom hole of this well from Mississippi, it always places the bottom hole in the State of Louisiana. I have just shown you the cross sections which I have taken from selected hydrographic surveys. I could have done that with every hydrographic survey. The cross-sections will show the channel line to be in the deepest water in the area under consideration. I have considered the lateral movement of the lines shown on the flood control and navigation maps of the Mississippi River. There has been very little lateral movements from the 1974 hydrographic survey which we placed before you and the 1982 hydrographic survey. There has been some movement but in every instance that line places the well in Louisiana, and the lateral movement from 1972 to 1982 has been of no consequence. It did not sway me to change my opinion that the safe and the preferred navigation line is as shown in the flood control and navigation maps of the Mississippi River. I have also talked to the pilots who navigate the river, I've talked with them. TR-225-228.

By contrast, Mr. Austin Smith testified that he did

not use the navigational aids nor any supporting documents other than his opinion as to where the thalweg should be. For instance, although Mr. Smith testified that he was familiar with channel reports, he completely disregarded their significance. Mr. Smith's apparent explanation for this lapse is that he does not agree with a lot of things that the Coast Guard does and, moreover, the Coast Guard was not in the "boundary business." TR-443. It is true that the Coast Guard is not in the business of establishing interstate boundaries, but it is certainly in the business of establishing tracks of navigation and any assertion to the contrary would be ridiculous. Mr. Harrison explained the importance of the Coast Guard channel reports at TR-129:

MR. KIMMEL:

Q. Now, what are channel reports, Mr. Harrison, do you know what they are; do you know what channel reports are?

MR. HARRISON:

A. They're issued periodically by the United States Coast Guard as an aid in navigating the Mississippi River.

MR. KIMMEL:

Q. How often are they put out?

MR. HARRISON:

A. Sometime they come out weekly, sometimes they come out, they may be two or three weeks between them.

MR. KIMMEL:

Q. And what are the purpose of the reports again, Mr. Harrison?

MR. HARRISON:

A. They are to show the mariner the safe navigation line. They are based on the latest hydrographic surveys by the Corps of Engineers, they are based on soundings taken by the Coast Guard and they are all oriented to the lights, the navigation lights on the Mississippi River.

Mr. Harrison's testimony clearly showed that the channel reports are quite detailed in advising mariners how to approach the crossing environment of Giles Bend. The reports explain which buoys to look out for as well as the distance a mariner is to position himself from a particular light. In most cases, channel reports advise mariners to position themselves either 200 or 300 yards open on Giles Bend Light. Not once did Mr. Smith's supposed navigation line or thalweg come close to the recommended navigation course of the United States Coast Guard.

Not only did Mr. Smith disregard the recommended sailing directions issued by the United States Coast Guard, but he also disregarded any other navigational aid which did not comport with his line. For instance, with reference to D-15 (October 1976 Hydrographic Survey), Mr. Smith's navigation line passes directly over a black can (black buoy) which the Coast Guard advises mariners to avoid by keeping to their right as clear as possible. Mr. Smith's only explanation for this is that it must be "off station" since it does not reflect his track of navigation. In considering this, it appears again that Mr. Smith is not seeking to determine a proper navigational line which is a true determination of a thalweg but, instead, is for-

mulating a line which bears absolutely no resemblance to the evidence.

MR. KIMMEL:

Q. All right, sir. Let's assume one of them was off station. On that particular hydrographic survey are they all off station?

MR. SMITH:

A. That I don't know.

MR. KIMMEL:

Q. All right, sir, well, let's assume they are not. We are assuming that most of the buoys the Coast Guard puts out there for their particular purpose are in the right place, are they not?

MR. SMITH:

A. Yes, sir, but I wasn't considering the locus of the buoys in that the locus of that live boundary at the time of that survey was irreputable along the thalweg, and—

MR. KIMMEL:

Q. That's your opinion, is it not?

MR. SMITH:

A. No, it's not my opinion, it's—the data speaks for itself.

MR. KIMMEL:

Q. Speaks for itself, all right, sir. Does your particular navigational channel practically run over the black cans that have been placed in the river by the Coast Guard for safe navigation? Yes or no, and then you can explain your answer.

MR. SMITH:

A. This is not a navigation line, this is a live boundary line. TR 448-449.

In addition to Mr. Hatley Harrison, Mr. Leo Odom, a Registered Civil Engineer and Certified Land Surveyor who has been a civil engineer for some 55 years, testified on behalf of the State of Louisiana. His opinion in conclusion as to where the course of downstream traffic would follow was similar to that of Mr. Harrison's, although Mr. Odom's approach was slightly different. Mr. Odom placed 3 lines on his exhibits which showed, for clarification, the geological thalweg, which is a line drawn at the deepest points and successive cross-sections of the river. TR-287. In addition, Mr. Odom utilized a sailing line based upon the Mississippi River Commission Floor Control and Navigation Map Number 38, TR-301, as well as the authorized project channel of the Corps of Engineers which is authorized to be maintained at not less than 9 feet below the average low water plain and 300 feet wide. Of these three lines, Mr. Odom, as an expert has recommended the utilization of the sailing line as depicted on his exhibits as a proper determination of the thalweg between the two states. TR-315.

Of the ten years in dispute, only 4, 1975-1977 and 1981, would place the well in the State of Mississippi, assuming Mr. Smith's testimony is to be believed. The Special Master, in his report at pages 16-22, analyzed all the evidence regarding the probable sailing line for the year 1975. Although Mississippi, in its brief, argues that the Special Master misunderstood Mr. Smith's analysis, it is quite apparent that he understood his testimony but did not consider it persuasive. The Special Master examined the hydrographic surveys for April 1975 (P-19, P-65, & D-11), and found that Mr. Smith's line did not conform to the available data on the surveys. For instance, it is incon-

ceivable that a mariner would adopt Mr. Smith's track of navigation and completely disregard important navigational aids such as lights and buoys. With reference to the September 1975 survey, P-20, P-66 & D-12, the Special Master believed that the route offered by Mr. Harrison and Mr. Odom had the same apparent advantages as the route recommended on the April, 1975 survey, in that their line made use of the various aids in navigation, including the Giles Bend Cut-Off Light, and comported with "filling in the marks", *i.e.*, using the lights to negotiate the crossing environment. Mr. Smith's line as evidenced by D-12 did not bear any resemblance to navigational aids and, in fact, passed over shallow water downstream from the well.

Mr. Smith's lack of utilizing available data to determine the probable downstream course of navigation is readily apparent in determining the boundary for 1976. On Mr. Smith's October Survey, D-14, his line completely ignores the crossing lights, overruns the first black buoy and places the second black buoy to the left of his tow. The black buoys, according to the United States Coast Guard, should be passed on the mariner's right as he proceeds downstream. Louisiana's experts proposed a navigational line based upon the hydrographic surveys, Flood Control and Navigation Map Number 38, as well as the channel reports.

For the year 1977, the Special Master found that Mr. Smith's line would not utilize the first mile of deep water, nor does Mr. Smith utilize the channel reports as an aid for navigating this particular stretch of the river. Louisiana's experts, on the contrary, kept the downstream traffic in the proper angle to negotiate the bend and fol-

lowed the channel reports utilizing the necessary lights and buoys.

For 1981, the Special Master found that Mr. Smith's boundary line bore no relationship whatsoever to the recommended course established by the United States Coast Guard. In addition, Mr. Smith failed to utilize the deep water upstream which would tend to attract mariners as they proceeded into the crossing. In spite of Mississippi's statements to the contrary, the recommended course put forth by Louisiana's experts would not cause a sharp turn to the left, but would be a gradual turn to the right as the mariner "filled in the marks" and headed for the next light downstream.

Taking into account all the available data, the Special Master discounted Mr. Smith's boundary line in favor of a navigation track recommended by Mr. Harrison and Mr. Odom.

Louisiana submits the Special Master's Report determining the probable course of navigation during the years in dispute should be adopted. Louisiana's experts interpreted the hydrographic surveys for each of the years in question. Moreover, they also considered the recommended sailing course established by the United States Coast Guard. It cannot be emphasized too highly, that, although the United States Coast Guard is not in the business of establishing a state boundary, it is also not in the business of running mariners aground. It seems inconceivable that the United States Coast Guard would recommend a particular path to negotiate a crossing which would place a mariner in jeopardy. The Coast Guard channel reports are usually published on a weekly basis

and they are based upon soundings taken almost continuously.

It must be stated at this point that Mr. Smith disregarded any physical evidence, including the channel reports, that did not comport with his recommended line. The fact that Mr. Smith's tow would run over a buoy is just one instance in which Mr. Smith completely disregarded the available data in order to establish a particular track of navigation.

The line drawn by Louisiana's two experts follows closely the data contained on the hydrographic surveys as well as the recommended sailing course of the Flood Control and Navigation Map Number 38 and the channel reports. The Special Master's Report in this regard should be adopted by this Court.

III.

**SECOND EXCEPTION OF THE STATE OF
MISSISSIPPI TO THE REPORT OF THE
SPECIAL MASTER**

Mississippi also argues that the Special Master erred in refusing to recommend by precise geodetic coordinates, a geographical locus of the live thalweg of the Mississippi for the entire reach of the river in dispute during each of the revelant years, 1972 to date.

Louisiana submits that the establishment of the boundaries as requested by Mississippi would be an utter act of futility. The thalweg in the disputed area is "live." The Special Master, if Mississippi's request were to be followed, would spend time and expense establishing a line which would be absolutely useless. The boundary as is evidenced by the various exhibits produced in this trial fluctuates virtually on a daily basis. No purpose would be served by having this boundary reduced to a map.

Although this case is styled as a boundary suit between Louisiana and Mississippi, the record clearly reflects the true nature of the lawsuit. This suit arose over the ownership of a well. Mississippi's reasons for establishing a live thalweg from 1972 just do not seem pertinent to the ultimate decision of this case. To this writer's knowledge, there has been no situation, whether it is for taxes or land title, where a live boundary need be drawn which goes back in time ten years. Moreover, any line drawn today, as Mississippi states, would be literally gone tomorrow before the ink is dry on the charts. Louisiana submits that the Special Master's reasoning for not at-

tempting the onerous task of drawing these lines is particularly applicable where, as in this case, the issue is ownership of production of a particular well located in the Mississippi River.

IV.

CONCLUSION

Louisiana respectfully submits that with reference to the live thalweg during the years in dispute, its experts reached an informed opinion scientifically based upon data available to them. They did not fashion a personal thalweg, but took into account and conformed their opinion to the surveys, channel reports, and navigational aids. In effect, they recommended to the Special Master a probable downstream course of traffic, and Louisiana submits that this is what they were supposed to do.

The opinion of Mississippi's expert left many "holes" and did not comport with the hydrographic survey including the proper contours; he did not take into account navigational aids such as lights and buoys; he did not follow in any respect, the channel reports which established a recommended course for mariners negotiating this particular reach of the river. Because of these shortcomings and oversights, the Special Master did not consider the Mississippi expert's testimony to be persuasive and, in reality, rejected much of it.

Considering the nature of this case, Louisiana further submits that it is not necessary for the Special Master to conduct a futile exercise of establishing a migrating boundary for ten years past, and it is equally futile for him to establish one today since that boundary will be non-existent tomorrow.

Louisiana submits that this Court should enter a de-

cree adopting the Special Master's report as written and rejecting Mississippi's claim in its entirety.

Respectfully submitted,

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A handwritten signature in dark ink, appearing to read "David C. Kimmel", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, DAVID C. KIMMEL, Assistant Attorney General of the State of Louisiana, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of September, 1983, I served copies of Louisiana's Reply Brief to the Exceptions of Mississippi by depositing same in the United States Mail, postage pre-paid, in the number and manner prescribed by Rule 33 of the Rules of the United States Supreme Court, addressed to:

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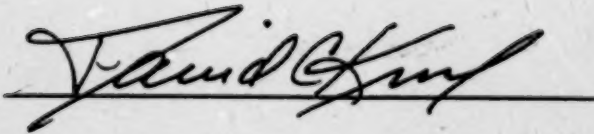
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A handwritten signature in cursive script, reading "David G. King", is written over a horizontal line. The signature is fluid and stylized, with the first name "David" being more prominent than the last name "King".

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